U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 30 November 2006

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In the Matter of:

C. B.,
Claimant,

v. **Case No.: 2005-BLA-05070**

B. COAL CO./
AMERICAN BUSINESS & MERCANTILE REASSURANCE COMPANY,
Employer/Carrier, and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.
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Appearances:

Andrew Delph, Esq., Wolfe, Williams & Rutherford, Norton, VA
For Claimant

Lucy Bowman, Esq., Street Law Firm, Grundy, VA
For Employer/Carrier

Before: PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER GRANTING BENEFITS

This proceeding arises from a modification request relating to a subsequent claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §901, *et. seq.* (hereafter "the Act") filed by Claimant on August 19, 2002. This is the third claim filed by Claimant. The putative responsible operator is B. Coal Company ("Employer"), which is insured through American Business & Mercantile Reassurance Company ("Carrier").

Part 718 of title 20 of the Code of Federal Regulations is applicable to this claim, as it was filed after March 31, 1980, and the regulations amended as of December 20, 2000 are also

applicable, as this claim was filed after January 19, 2001.[1] 20 C.F.R. §718.2. In *National Mining Assn. v. Dept. of Labor,* 292 F.3d 849 (D.C. Cir. 2002), the U.S. Court of Appeals for the D.C. Circuit rejected the challenge to, and upheld, the amended regulations with the exception of several sections.[2] The Department of Labor amended the regulations on December 15, 2003 for the purpose of complying with the Court's ruling. 68 Fed. Reg. 69929 (Dec. 15, 2003).

The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, including all evidence admitted and arguments submitted by the parties. Where pertinent, I have made credibility determinations concerning the evidence.

STATEMENT OF THE CASE

Claimant has filed three claims for black lung benefits.

In the first claim form, filed on August 14, 1990, Claimant indicated that he was born in 1941 and that he stopped working in the coal mines in January 1986 due to a back injury, after 29 years of coal mine employment. (DX 1, former exhibit 39-1). That claim was denied by the district director on February 1, 1991, because the evidence did not show that Claimant had pneumoconiosis, that it was caused at least in part by his coal mine work, or that he was totally disabled by the disease. (DX 1, former exhibit 39-15). No appeal was filed and the denial became final. (DX 1, former exhibit 39).

Claimant's second claim for black lung benefits was filed on January 21, 1994. (DX 1, former exhibit 1). Following a hearing held on October 29, 1996, Administrative Law Judge Joan Huddy Rosenzweig issued a September 11, 1997 Decision and Order Denying Benefits. While finding evidence suggestive of a totally disabling (but not necessarily permanent) respiratory or pulmonary impairment, Judge Rosenzweig denied the claim because Claimant had failed to establish pneumoconiosis or total disability due to pneumoconiosis. In a Decision and Order of October 14, 1998, the Benefits Review Board affirmed Judge Rosenzweig's decision on the pneumoconiosis issue alone, and the denial became permanent.

Claimant filed this, his third claim for benefits, on August 19, 2002. (DX 3). An examination was conducted on October 22, 2002 for the Department of Labor by Krishna Rao, M.D., in Ocala, Florida, less than 100 miles from Claimant's Florahome, Florida home. (DX 14). On January 16, 2003, the District Director issued a Schedule for the Submission of Additional Evidence which indicated that the Claimant would not be entitled to benefits if a decision were issued at that time and the listed coal mine operator (B. Coal Co., Inc., insured through American Business & Mercantile Insurance Mutual, Inc.), was the responsible operator. (DX 20). The District Director issued an April 28, 2003 Proposed Decision and Order Denial of Benefits, which found that the Claimant had proven 24 years of coal mine employment (from 1958 to 1986) but that the evidence did not show he had black lung disease or the disease was caused at least in part by coal mine work, and that while the evidence showed that he had a

[1] Section and part references appearing herein are to Title 20 of the Code of Federal Regulations unless otherwise indicated.

[2] Several sections were found to be impermissibly retroactive and one which attempted to effect an unauthorized cost shifting was not upheld by the court.

breathing impairment of sufficient degree to establish total disability, there was no credible evidence that the breathing impairment was caused by the Claimant's coal mine employment. (DX 29).

Claimant filed a modification request on July 16, 2003. (DX 32). In support, he submitted a medical examination report and test results from Dr. Randolph Forehand. (DX 32). A "Proposed Decision and Order Denying Request for Modification" was issued on December 4, 2003. (DX 35). The district director gave no weight to the x-ray interpretation submitted (relating to a March 17, 2003 x-ray) because the chest x-ray was not made available and he refused to consider a film dated November 14, 2003 because it would exceed the evidentiary limitations.

Subsequently, under cover letter of February 11, 2004, the Claimant submitted a medical report from Dr. D.L. Rasmussen, which was accepted as a second modification request. (DX 36).[3] After review of this additional evidence, the District Director issued a "Proposed Decision and Order Granting Request for Modification" dated June 3, 2004. (DX 39). A motion to vacate and motion to compel filed by the Employer were denied. (DX 41). In view of the Employer's failure to agree to pay benefits and request for a hearing, Claimant began receiving benefits from the Black Lung Disability Trust Fund. (DX 42, 45). The case was transmitted to the Office of Administrative Law Judges on October 6, 2004. (DX 46).

By letter of October 18, 2004, filed on October 25, 2004, counsel for Claimant asked that the hearing be "held in Abingdon or Grundy vicinity for purposes of place of hearing only" and noted that the claimant did not waive the 100 mile rule for coal company medical examinations. Under counsel's cover letter of March 7, 2005, Employer filed a Notice that it intended to contest the responsible operator issue and a Motion for Dismissal because the Claimant was examined by his own physicians in Virginia and West Virginia but refused to allow Employer's physicians to examine him there.

Initially this case was assigned to Administrative Law Judge Daniel Solomon, who conducted a telephone conference on the Employer's Motion. Essentially, Employer argued that Claimant should be required to attend an examination before a physician of Employer's choice located in the "coal fields" of Virginia and West Virginia. Judge Solomon denied the motion, in accordance with 20 C.F.R. § 725.414(a)(3)(i). On reconsideration, after the case was assigned to me, I also denied the motion, by Order of June 30, 2005.[4] That Order also amended the caption, as per the Employer's request, to reflect the Carrier's name of "American Business & Mercantile Reassurance Company."

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[3] As discussed below, DX 36 was stricken by agreement and a more recent examination report by Dr. Rasmussen was substituted.

[4] Section 725.414(a)(3)(i) provides that in obtaining medical examination evidence, "the responsible operator may not require the miner to travel more than 100 miles from his or her place of residence, or the distance traveled by the miner in obtaining the complete pulmonary evaluation provided by §725.406 of this part, which ever is greater, unless a trip of greater distance is authorized in writing by the district director." As noted in the Order, "the DOL pulmonary examination was conducted in Ocala, Florida, approximately 55 miles from the Claimant's residence in Florahome, Florida."

A hearing in the above-captioned matter was held on September 30, 2005 in Abingdon, Virginia. At the hearing, Director's Exhibits 1 through 49 ("DX 1" through "DX 49"), Claimant's Exhibit 1 ("CX 1"), and Employer's Exhibits 1(a), 1(b), 1(c), 2(a) and 2(b) ("EX 1(a)" through "EX 2(b)") were admitted into evidence. (Tr. at 6, 13, 49-52). Claimant was the only witness to testify. At the conclusion of the proceedings, the record was left open for a period of 120 days, consisting of 60 days for submission of Dr. Brooks' report with associated testing and the interpretation of Dr. Rasmussen's January 13, 2005 x-ray; 30 days for rebuttal or rehabilitation evidence and for the deposition of Dr. Brooks; 30 days for any further rehabilitation evidence; and 30 days after completion of the record for closing arguments or briefs. (Tr. 53-58).

By Orders of December 2, 2005 and January 23, 2006, the parties were allowed additional time due to difficulty in obtaining the x-ray and the deadlines were extended. The x-ray interpretation by Dr. Wiot, which has been marked as Employer's Exhibit 3 ("EX 3"), was submitted under counsel's cover letter of April 4, 2006. The report of Dr. Brooks and his curriculum vitae were submitted under cover letters of February 13, 2006 and February 14, 2006, and have been marked as "EX 4" and "EX 5," respectively. [5] EX 3, EX 4, and EX 5 are hereby admitted into evidence and the record is now closed. **SO ORDERED.**

After the record was complete, Employer requested additional time to file its closing argument, which was filed on June 9, 2006, and the Director requested additional time to respond. The Director's brief was filed on July 5, 2006. Both requests for additional time were formally granted by Order of July 25, 2006 and the briefs were accepted as timely filed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Issues/Stipulations

The issues before me are timeliness, length of coal mine employment,[6] the existence of pneumoconiosis, its causal relationship with coal mine employment, total disability, causation of total disability, responsible operator, and subsequent claims. (Tr. 6-9; DX 46). Additional issues were listed or preserved for appellate purposes. Specifically, Employer has argued that it is entitled to have Claimant examined by a "coal field" physician in Appalachia instead of a physician within 100 miles of Claimant's home, and, as noted above, that argument has been rejected by Judge Solomon and by the undersigned administrative law judge.[7] (Tr. 9-10).

Medical Evidence

The newly submitted medical evidence in this case is listed below.

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[5] It does not appear that a deposition of Dr. Brooks was taken. No transcript was submitted post-hearing.

[6] The Employer stipulated only to Claimant's employment with it which was "two years, or maybe a little less." (Tr. 9).

[7] Following a March 15, 2005 telephone hearing, Administrative Law Judge Daniel Solomon denied Employer's motion. By Order of June 30, 2005, I denied Employer's motion for reconsideration.

Interpretations of "new" chest X-rays which utilize the ILO system and are in compliance with the regulatory standards, are summarized in the table below.

Exhibit No.	**Date of X-ray/ Reading**	**Physician/ Qualifications**	**Interpretations**
DX 14 DOL exam	**October 22, 2002**/ Same	K. Rao	Completely negative. Film quality 1.
DX 14 DOL exam	October 22, 2002/ November 12, 2002	A. Goldstein B-Reader	Read for quality only. Film quality 1.
DX 32 Claimant initial	**March 17, 2003**/ Same	J. Forehand B-Reader	1/0; s/t, lower 4 zones. Film quality 1.
CX 1 Claimant initial (mod.)	**January 13, 2005**/ Same	M. Patel BCR & B-Reader	1/1; s/t, all 6 zones; classifiable as pneumoconiosis. Metallic foreign body. "kl" [septal (kerley) lines]. Film quality 1.
EX 3 Employer Rebuttal (mod.)	January 13, 2005/ February 15, 2006	J. Wiot BCR & B-Reader	No parenchymal or pleural abnormalities consistent with pneumoconiosis. Aortic arteriosclerosis, calcified granulomas. Film quality 1.
EX 4 Employer Mod.	**August 28, 2005**/ September 1, 2005	T. Hazelton B-reader	No parenchymal or pleural abnormalities consistent with pneumoconiosis. Left lower lung nodule; pulmonary hyperinflation due to emphysema and/or airways disease; central pulmonary artery enlargement suggesting pulmonary arterial hypertension. "ca"; "cp";[8] "em." Film quality 1.

Pulmonary function tests taken on October 22, 2002 (DX 14) (Dr. Rao's examination, for DOL); March 17, 2003 (DX 17) (Dr. Forehand's examination, Claimant's Initial); January 13, 2005 (CX 1) (Dr. Rasmussen's examination, Claimant's modification); and August 29, 2005 (EX 4) (Dr. Brooks' examination, Employer/Carrier's modification) produced the following results:

[8] Although this abbreviation means "cor pulmonale" based on the definitions on the reverse of the Form CM-933b (Rev. Sept. 2001) (see DX 14), the accompanying typed report does not indicate such a finding. (EX 4).

Exhibit No.	Date/ Physician	Age/ Height	FEV1 (pre and post bronchodilator)	FVC (pre and post bronchodilator)	MVV (pre and post bronchodilator)	FEV1/FVC (pre and post bronchodilator)
DX 14	10/22/2002 Rao	61 yrs. 69 inches	1.10 (pre)	2.31 (pre)	41 (pre)	48% (pre)
DX 32	03/17/03 Forehand	62 yrs. 66 inches	1.54 (pre) 1.46 (post)	2.67 (pre) 2.98 (post)	42 (pre) 48 (post)	58% 49%
CX 1	01/13/2005 Rasmussen	63 yrs. 66¼ in.	1.35 (pre) 1.52 (post)	3.09 (pre) 4.02 (post)	Not recorded.	44% 38%
EX 4	08/29/2005 Brooks	64 yrs. 67 inches	1.43 (pre) 1.29 (post)	2.95 (pre) 3.41 (post)	Not recorded.	49% 44%

Under subparagraph (i) of section 718.204(b)(2), total disability is established if the FEV1 value is equal to or less than the values set forth in the pertinent tables in 20 C.F.R. Part 718, Appendix B, for the miner's age, sex and height, if in addition, the tests reveal qualifying FVC or MVV values under the tables, or an FEV1/FVC ratio of less than 55%. All of the results are qualifying for total disability under the federal regulations.

Arterial blood gases were taken on October 22, 2002 (Rao examination for DOL) (DX 13); March 17, 2003 (Forehand examination, Claimant's initial) (DX 32); January 13, 2005 (Rasmussen examination, Claimant's Modification) (CX 1); and August 29, 2005 (Brooks examination, Employer/Carrier's Modification) (EX 4). The ABGs produced the following values, some of which were qualifying under Part 718, Appendix C:

Exhibit No.	Date	Physician	pCO2	pO2	Qualifying?
DX 13	10/22/2002	Rao	49 (rest) 50 (exercise)	66 (rest) 67 (exercise)	No Yes
DX 32	03/17/2003	Forehand	41 (rest) 44 (exercise)	58 (rest) 44 (exercise) (sic)	Yes Yes
CX 1	01/13/2005	Rasmussen	43 (rest) 44 (exercise)	59 (rest) 49 exercise	No Yes
EX 4	08/29/2005	Brooks	48 (rest)	63 (rest)	No

Medical opinions were rendered by four physicians.[9] Specifically, opinions were issued by Dr. Krishna Rao in connection with the October 22, 2002 DOL examination (DX 14); by Dr. J. Randolph Forehand in connection with the March 17, 2003 examination of the Claimant (DX 14; Claimant's initial); by Dr. Donald Rasmussen in connection with the January 13, 2005 examination of the Claimant (CX 1, Claimant's modification examination); and by Dr. Stuart Brooks in connection with the August 29, 2005 examination of the Claimant (EX 4; Employer/Carrier modification examination).

[9] As noted above, Dr. Rasmussen offered two opinions; however, in order to comply with the evidentiary limitations, the Claimant withdrew the first (December 4, 2003) examination report and it was stricken from the record, together with the associated testing results from that examination (all included in DX 36).

(1) **Krishna Rao, M.D.**, a board certified pulmonologist, examined the Claimant for the Department of Labor on October 22, 2002. (DX 14). He recorded a 26-year coal mining history ending in 1986 and a 26 year smoking history, at one pack per day, extending from approximately "1970 ?" to 1996. *Id.* He also set forth an extensive patient history (including daily sputum, wheezing, dyspnea, and cough, chest pain in 1996, and occasional ankle edema and paroxysmal nocturnal dyspnea) and listed detailed clinical findings (including r[h]onchi and wheezes). *Id.* Dr. Rao's cardiopulmonary diagnoses were Severe COPD [Chronic Obstructive Pulmonary Disease], Chronic Bronchitis, and CAD [Coronary Artery Disease] S/P [status post] multiple stents. Under Etiology, he listed Cigarette Smoking and Atherosclerosis; under Impairment, he indicated that the Claimant was severely impaired as a result of the diagnosed conditions; and under Non-Cardiopulmonary Diagnosis, he listed "DJD" [Degenerative Joint Disease]. (DX 14).

(2) **J. Randolph Forehand, M.D.**,[10] examined the Claimant on March 17, 2003, at which time he assumed a 29-year mining history (24 years underground and 5 years above ground) and a 46-year smoking history. (DX 32). Based upon his training and experience, taking into consideration Claimant's work history, physical complaints, and clinical test results, Dr. Forehand determined that the Claimant had coal worker's pneumoconiosis (CWP). He also diagnosed chronic bronchitis, based upon Claimant's cigarette smoking history and history of productive cough. Dr. Forehand discussed the epidemiological evidence concerning CWP and its contribution to COPD, and the lack of dust controls prior to 1972. He determined that the Claimant was exposed to high levels of both coal and hard rock dust for a significant length of time before the levels were brought under control by law. Dr. Forehand described the requirements of Claimant's last coal mine job, which "consisted of carrying and spreading 50-pound bags of rock dust, pulling and repositioning heavy-duty electrical cable, shoveling coal onto the belt line, and carrying and repositioning timbers and jacks all in 24-36" dusty coal seams" and he concluded that the Claimant did not have the respiratory capacity to meet the physical demands of that job. *Id.* He also determined that Claimant's total and permanent respiratory impairment had arisen from a combination of CWP and cigarette smoking. *Id.* In particular, he relied upon the chest x-ray, which showed CWP but no emphysema. (DX 32).

(3) **Donald L. Rasmussen, M.D.**, a board-certified internist who specializes in pulmonary diseases, examined the Claimant on January 13, 2005. (CX 1). Dr. Rasmussen recorded an occupational history of 27 to 29 years of employment in the coal mines, between 1959 and 1986, as a hand loader, motor operator, roof bolter, jack setter, bridge operator, and (his last job) belt line worker, a job that involved heavy and very heavy manual labor. He also recorded a medical and family history, review of systems, physical examination findings, and laboratory study results. Based upon the very marked loss of lung function on pulmonary function testing and progressive hypoxia on light exercise on arterial blood gases, Dr. Rasmussen determined the Claimant was totally disabled from performing his last regular coal mine job, because he lacked the breathing reserve or gas exchange reserve to perform work at that level of oxygen requirement. *Id.* Dr. Rasmussen found that it was medically reasonable to conclude that

[10] Although Dr. Forehand lacks the credentials of board certification in internal medicine and pulmonary medicine, he received pulmonary training and has worked extensively with coal miners at the Southern Appalachian Center for Pulmonary Studies, where he is director, and as an examining physician for the Department of Labor. (DX 32).

the Claimant had coal worker's pneumoconiosis which arose from his coal mine employment; that the two known causes of his impaired function were cigarette smoking and coal mine dust exposure; that both cause COPD/emphysema and small airways disease that are indistinguishable; that coal mine dust exposure also causes interstitial fibrosis; and that the Claimant most likely had a combination of emphysema, interstitial fibrosis and small airways disease. *Id.* Based upon the above, Dr. Rasmussen concluded that the Claimant had "both clinical and legal pneumoconiosis, which contribute in a major way to his disabling lung disease." (CX 1).

(4) **Stuart M. Brooks, M.D.,** a board-certified pulmonologist, examined the Claimant on August 29, 2005, when Claimant was 64 years old. *Id.* Dr., Brooks took into account a history of employment in and around the coal mines for approximately 29 years, beginning around 1958 and ending around 1987, when he sustained a back injury. He also recorded a 41-year smoking history extending from approximately age 18 until age 59, at a rate of one half to one pack of cigarettes per day, for a total of 20 to 41 pack years. In addition, Dr. Brooks recorded a medical history (including a history of cough since age 40 [1981] and shortness of breath with exertion in 1988 or 1989), a social and family history, physical findings (including expiratory wheezes and inspiratory rales and a heart murmur), laboratory test results, and medical record review (including the opinions of other physicians). *Id.* Dr. Brooks determined that there was no evidence of coal workers' pneumoconiosis and that Claimant suffered from chronic obstructive pulmonary disease with emphysema. *Id.* He also stated his opinion that Claimant did not have CWP or any changes resulting from coal mine employment. *Id.* He attributed the Claimant's COPD to his long history of cigarette smoking and stated that it was also possible that there was a contribution by an asthmatic component. *Id.* Finally, he determined that the Claimant was totally disabled from performing his last coal mine job from a respiratory standpoint due to COPD (a combination of emphysema, chronic bronchitis, and an asthmatic or bronchospastic component) but that coal mine employment was not a contributing factor to his total disability. (EX 4).

Background and Employment History

Claimant, who was 64 years old at the time, was the only witness to testify at the hearing before me. He was a credible witness. He appeared ill, was on oxygen, and coughed frequently. Claimant had previously testified in 1996 (DX 1). At the hearing before me, Claimant testified that he was married and still lived with his wife but had no other dependents. (Tr. 26).

Claimant testified that he worked a total of 29 years in the coal mines, primarily at the face area, where he worked the beltline, ran the rock dusting machine, ran the roof bolter, ran a Wilcox miner, worked on a general inside clean up crew, and ran a shuttle car. (Tr. 26). His last job was working on the belt line. (Tr. 26-27). He quit working in the mines because he broke his back. (Tr. 27). His last employer was Double B [transcribed as "BB"] Coal Mining, in Virginia, where he worked for about six months, working underground on the cleanup crew, shoveling the beltlines. (Tr. 29-30). He received compensation for his back injury for nine years and nine months. (Tr. 31). Dr. Brassfield was the physician who performed his back surgery. (Tr. 31). Prior to his work for Double B, he worked for B. Coal, where he was vice president; he and his brother were owners of the company. (Tr. 32-33). At that job, he worked outside,

(running an end loader, loading trucks with coal) although some days he would go inside. (Tr. 33-34, 46-47). Double B Coal was leased by Randy Smith and Lloyd Blankenship from United Coal Company. (Tr. 34-35).

When asked to describe his current symptoms, Claimant stated that he could hardly breathe and could hardly walk. (Tr. 27). He started that Dr. Rasmussen had recommended oxygen but that his current physician, Dr. Vernaccio in Florida, actually put him on oxygen. (Tr. 27, 38-39). Claimant testified that the same doctor is treating him for his heart problems. (Tr. 28). Claimant had a heart attack in 1996 and currently takes aspirin and Lipitor. (Tr. 37-38). He is also on an inhaler and a Nebulizer for his breathing. (Tr. 47-48).

Concerning his smoking history, Claimant testified that he used to smoke, from approximately age 18 until seven or eight years ago [age 56 or 57] "or longer", but was now chewing tobacco. (Tr. 28). He stated that he used to smoke about a pack a day but noted that he could not smoke inside the mines. (Tr. 29). On cross examination, he admitted that he stated in interrogatory responses that he would smoke occasionally when nervous five to ten cigarettes per day, but he explained that he never took smoking back up as a habit and was currently not even smoking when nervous. (Tr. 40-42).

Discussion

Evidentiary Limitations

My consideration of the medical evidence is limited under the regulations, which apply evidentiary limitations to all claims filed after January 19, 2001. 20 C.F.R. §725.414. Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. *Dempsey v. Sewell Coal Co.,* 21 BLR --, BRB No. 03-0615 BLA (June 28, 2004) (en banc) (slip op. at 3)*, citing* 20 C.F.R. §§725.414; 725.456(b)(1). Under section 725.414, the claimant and the responsible operator may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." *Id., citing* 20 C.F.R. §725.414(a)(2)(i),(a)(3)(i). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406." *Id., citing* 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). Following rebuttal, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." *Id.* "Notwithstanding the limitations" of section 725.414(a)(2),(a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." *Id., citing* 20 C.F.R. §725.414(a)(4). Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." *Id., citing* 20 C.F.R.

§725.456(b)(1). The parties cannot waive the evidentiary limitations, which are mandatory and therefore not subject to waiver. *Phillips v. Westmoreland Coal Co.,* 2002-BLA-05289, BRB No. 04-0379 BLA (BRB Jan. 27, 2005) (unpub.) (slip op. at 6).

All admissible evidence from the prior claims is admitted into evidence as DX 1. Section 725.309(d)(1) provides that "any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim." Additionally, in *Church v. Kentland-Elkhorn Coal Corp.*, BRB Nos. 04-0617 BLA and 04-0617 BLA (Apr. 8, 2005)(unpub.), the Board stated that "as noted by the Director, when a living miner files a subsequent claim, all evidence from the first miner's claim is specifically made part of the record." Therefore, all evidence relating to the prior claims is admissible.

This case is somewhat complicated because there were two modification requests. For each, a party may submit one additional x-ray interpretation, one additional pulmonary function test, one additional arterial blood gas study, and one additional medical report. *See* 20 C.F.R. § 725.310(b). Although for ease of reference I have identified it herein as Claimant's initial evidence, I have included Dr. Forehand's report and associated testing as admissible as Claimant's submission in support of his first modification request. Dr. Rasmussen's report and associated testing is admissible as Claimant's submission in support of his second modification request, and Dr. Brooks' report and associated testing is Employer's submission in connection with the second modification request.

The evidence designated by both parties is in compliance with the evidentiary limitations. In this regard, Claimant withdrew the earlier examination report by Dr. Rasmussen (which had been submitted in connection with the second modification request) and substituted the later one to bring its evidence in compliance. Employer did not submit a designation form, but inasmuch as its submission on the second modification consists of Dr. Brooks' report and test results, its evidence is in compliance.

In its post hearing brief, Employer argues that "[t]he Director's award cannot stand as it is based upon evidence improperly associated with this modification request." Employer's Brief at 17. Employer's argument is premised upon the fact that the report by Dr. Rasmussen, upon which the Director's award of benefits was premised, has been stricken from the record. However, Employer misunderstands the nature of proceedings before the Office of Administrative Law Judges. While in some instances prior decisions must be considered in applying regulatory provisions relating to modification or subsequent claims analysis, hearings before administrative law judges are de novo and are not necessarily based upon the same record that was before the district director. Moreover, there is nothing in the regulations that would prevent an administrative law judge from allowing the substitution of one report for another by the same physician, particularly where, as here, no party has been prejudiced. In this regard, Dr. Rasmussen's later report was available to Dr. Brooks. Further, in adjudicating this claim, I must make my own determination based upon the evidence before me, and there is no need for me to determine whether substantial evidence supported the district director's determination.

Responsible Operator

Employer has argued that it does not qualify as the responsible operator because the last coal mine employer for which Claimant worked was Double B Coal Mining and, although he only worked there for about six months, he continued to receive worker's compensation benefits for a back injury that he sustained on that job for over nine years. In support, Employer cites cases (*Boyd v. Island Creek Coal Co.,* 8 B.L.R. 1-458 (1986); *Verdi v. Price River Coal Co.,* 6 B.L.R. 1-1067 (1984)) standing for the proposition that paid sick leave due to a work related injury counts toward establishing a year of employment. Employer's Brief at 13. Employer reasons that inasmuch as Claimant received paid leave time for his work-related back injury, such time qualifies for the purpose of determining length of employment. *Id. See also Thomas v. BethEnergy Mines, Inc*., 21 B.L.R. 1-10 (1997) (on recon.)

In the Director's Response to Operator's Brief, the Director disputes the applicability of this rule because, according to his 1996 testimony (Transcript of October 29, 1996 testimony at pages 11-12, 16-17, DX 1), Claimant retired because of his back injury and never returned to coal mine employment.[11] Director's Response at 3. The Director argues that because the Claimant was not employed by Double B at the time he received the worker's compensation benefits, the period during which he received worker's compensation benefits cannot be included under the pertinent regulations (citing 20 C.F.R. § 725.495(c) and 725.101(a)(32).)[12] *Id.* Further, the Director argues that Judge Rosenzweig's finding that B. Coal Company was the properly designated responsible operator, because he had no further coal dust exposure when he was receiving worker's compensation benefits, is controlling. *Id.*

In her September 11, 1997 decision, Judge Rosenzweig cited the rebuttable presumption in former section 725.492(c) [now appearing at § 725.491(d)] to the effect that "[f]or the purposes of determining whether an employer is or was an operator" liable for the payment of benefits, "there shall be a rebuttable presumption that during the course of an individual's employment such individual was regularly and continuously exposed to coal dust during the course of employment" which presumption "may be rebutted by a showing that the employee was not exposed to coal dust for significant periods during such employment." Judge Rosenzweig found that the presumption of regular and continuous exposure had been rebutted because, although Claimant was exposed to coal dust for six months while working for Double B, the record reflects that he had no further exposure while he received workers' compensation benefits. *Id.* Although the Employer argued that Judge Rosenzweig's analysis was incorrect, in its October 14, 1998 Decision and Order, the Benefits Review Board refused to consider its arguments on the issue because only the Claimant had appealed her decision. (DX 1).

I find that Judge Rosenzweig's analysis is not controlling as the regulations have been amended to clarify the length of employment issue, and the amendment does not exclude periods during which the miner was employed but did not receive dust exposure for purposes of

[11] Claimant testified that "[t]hey retired me on my back." Transcript of October 29, 1996 testimony at page 11, DX 1.

[12] Section 725.495(c) places the burden of poof upon the named responsible operator to establish that it is not the potentially liable operator that most recently employed the miner while section 725.101(a)(32) defines "Year."

determining whether a miner was employed for a year, although that factor may be relevant to a calculation of the number of working days during the year. Specifically, the definition of "Year" in section 725.101(a)(32) provides:

> (32) *Year* means a period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 "working days." A "working day" means any day or part of a day for which a miner received pay for work as a miner, but shall not include any day for which the miner received pay while on an approved absence, such as vacation or sick leave. In determining whether a miner worked for one year, any day for which the miner received pay while on an approved absence, such as vacation or sick leave, may be counted as part of the calendar year and as partial periods totaling one year.

20 C.F.R. § 725.101(a)(32). As the Court of Appeals for the Fourth Circuit noted in *Armco, Inc. v. Martin,* 277 F.3d 468 (4th Cir. 2002) (citing *Northern Coal Co. v. Director, OWCP,* 100 F.3d 871 n. 8 (10th Cir. 1996)),[13] in addressing the regulation's predecessor (former section 725.493(b) (1999)), the responsible operator determination depends upon the resolution of two issues: (1) whether the Claimant was employed for a period of one year or partial periods totaling one year and (2) whether the coal mine employment was "regular," meaning that during the year the miner was regularly employed in or around a coal mine for a minimum of 125 days. The initial determination may include periods of approved absences while the latter (125-day) determination cannot.[14]

Thus, the issue of whether Claimant was employed by Double B Coal for a period of one year depends upon whether the Claimant's receipt of worker's compensation benefits may be deemed to be "an approved absence, such as vacation or sick leave." I find that it cannot be considered to be such based upon the following:

> (1) The Claimant testified that he was employed by Double B Coal for approximately six months before he injured his back, and that he received compensation for nine years and nine months. (Tr. 29-31). He also testified in 1996 that he was last employed by Double B on January 26, 1986 and that he "was retired" because of his back injury. (Transcript of October 29, 1996 testimony at pages 11-12, 16-17, DX 1). His claim forms and Employment History forms also reflect that he left coal mine employment in 1986. (DX 1, 3, 4). The Social Security records do not reflect earnings with Double B Mining Co. after 1985. (DX 11). These factors taken together suggest that his employment with Double B terminated at the time of his injury and did not extend for any period into the future.

[13] In *Northern Coal Co. v. Director, OWCP,* 100 F.3d 871 n. 8 (10th Cir. 1996), the Court of Appeals for the Tenth Circuit approved of a calculation of length of coal mine employment which included a period during which the miner remained employed by Northern on sick leave until he was laid off.

[14] In amending the regulations, the Department stated that "in order to have one year of coal mine employment, the regulations contemplate an employment relationship totaling 365 days, within which 125 days were spent working and being exposed to coal mine dust, as opposed to being on vacation or sick leave." Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79959 (Dec. 20, 2000).

(2) The regulations address approved absences and specifically mention vacation or sick leave as examples. Thus, the regulation suggests that an injured employee who receives worker's compensation benefits and then returns to work will be covered. They do not address the situation where the benefits are received after an injury and the Claimant is not expected to return to work. Except to the extent that benefits are payable as sick or annual leave (such as in *Northern Coal Co.* where the period of time the miner was paid for sick leave prior to being laid off was included), benefits in such a situation are not similar to wages and appear rather to be analogous to a lump sum settlement paid to an injured party. As there is no evidence that any of the payments to the Claimant were sick or annual leave, I find that the period of time Claimant received worker's compensation benefits after his injury may not be properly included.[15]

In view of the above, I find that Double B Coal Company does not qualify as the responsible operator that last employed the Claimant for a period in excess of one year and I further find that B. Coal Company was properly named as the responsible operator.

Modification

As noted above, there are two modification requests involved in the instant case. The standards for granting a request for modification of a previous denial of benefits are set forth in the regulations at 20 C.F.R. §725.310(a). That regulation states, in pertinent part:

> Upon . . . the request of any party on grounds of a change in conditions or because of a mistake in a determination of fact, the district director may,. . . at any time before one year after the denial of a claim, reconsider the terms of an award or denial of benefits.

To establish a basis for modification, a claimant must either establish a change in conditions or a mistake in a determination of fact, as provided in 20 C.F.R. §725.310. To determine whether there has been a change in conditions, the administrative law judge must "perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish the element or elements which defeated entitlement in the prior decision." *Napier v. Director, OWCP*, 17 B.L.R. 1-111, 113 (1993); *Natolini v. Director, OWCP*, 17 B.L.R. 1-82, 1-84 (1993). An administrative law judge may grant modification premised upon a mistake in determination of fact based upon an allegation that the ultimate fact was mistakenly decided; "[t]here is no need for a smoking-gun factual error, changed conditions, or startling new evidence." *Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993). The *Jessee* court continued by explaining that, in looking for a mistake in fact: "No new evidence is required. A claims examiner may 'correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted.'" *Id.* at 724 (quoting *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971) (per curiam) (decided under Longshore and Harbor Workers' Compensation Act)). If a basis for modification

[15] In so finding, I need not resolve whether a period of time after the Claimant left his employment with Double B could be properly included if evidence were submitted showing that he remained on the books as an employee or that he received annual or sick leave. No evidence of such is of record.

is found, the claim must be considered on the merits, based upon all the evidence of record. *See Kovac v. BCNR Mining Corp.*, 14 B.L.R. 1-156, 1-158 (1990), *modified on recon*., 16 B.L.R. 1-71, 73 (1992).

Thus, in connection with the instant modification request, I must consider the new evidence to determine whether it establishes an element upon which the claim was denied or whether it reveals that a fact was wrongly decided. In this regard, the instant claim was initially denied based upon a failure to show pneumoconiosis, its causal relationship with coal mine employment, or total disability due to pneumoconiosis, and the first request for modification was denied on unspecified grounds. (DX 29, 35).

Subsequent Claims Analysis

In addition to comprising two modification requests, the instant case is a subsequent claim, because it was filed more than one year after the last denial of benefits in 1998. *See* §725.309(d). Previously, such a claim would be denied based upon the prior denial unless the Claimant could establish a material change in conditions. *See* 20 C.F.R. §725.309(d). The Fourth Circuit Court of Appeals held that to establish that a material change in condition has occurred, the Claimant must prove, by a preponderance of the evidence developed subsequent to the denial of the prior claim, at least one of the elements adjudicated against him in the prior denial. *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358 (4th Cir. 1986)(en banc).[16] If the miner establishes the existence of that element, he has demonstrated a material change. *Id.* Then the administrative law judge must consider whether all of the evidence, including that submitted with the previous claims, supports a finding of entitlement to benefits. *Id.*

The amended regulations have replaced the material-change-in-conditions standard with the following standard:

> (d) If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part (see §725.502(a)(2)), the later claim shall be considered a subsequent claim for benefits. **A subsequent claim** shall be processed and adjudicated in accordance with the provisions of subparts E and F of this part, except that the claim **shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement** (see §§725.202(d) (miner), 725.212 (spouse), 725.218 (child), and 725.222 (parent, brother, or sister)) **has changed since the date upon which the order denying the prior claim became final.**[17] The applicability of this paragraph may be waived by the operator or fund, as appropriate. The following additional rules shall apply to the adjudication of a subsequent claim:

[16] Because Claimant's last exposure to coal mine dust occurred in West Virginia, this claim arises within the territorial jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Broyles v. Director, OWCP*, 143 F.3d, 21 BLR 2-369 (10th Cir. 1998).

[17] For a miner, the conditions of entitlement include whether the individual (1) is a miner as defined in the section; (2) has met the requirements for entitlement to benefits by establishing pneumoconiosis, its causal relationship to coal mine employment, total disability, and contribution by the pneumoconiosis to the total disability; and (3) has filed a claim for benefits in accordance with this part. 20 C.F.R. §725.202(d) *Conditions of entitlement: miner.*

(1) Any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.
(2) For purposes of this section, **the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based.** For example, if the claim was denied solely on the basis that the individual was not a miner, the subsequent claim must be denied unless the individual worked as miner following the prior denial. Similarly, if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of this subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.
(3) **If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement.** . .
(4) If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see § 725.463), shall be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim. . . .[Emphasis added.]

20 C.F.R. § 725.309(d) (2003). Thus, it is necessary to look at the new evidence relating to each medical condition of entitlement to determine whether it establishes that condition of entitlement.

The prior claim was denied by Judge Rosenzweig because the medical evidence failed to establish that the Claimant suffered from pneumoconiosis or was totally disabled due to pneumoconiosis, but the Board only affirmed the pneumoconiosis finding. (DX 1). Establishment of this element would therefore reopen the claim for consideration of the merits. Thus, I must first determine whether the new evidence establishes that the Claimant has established that he suffers from pneumoconiosis based upon the new evidence.

Existence of Pneumoconiosis based upon New Evidence

Under 20 C.F.R. §718.202(a)(1)-(4), a finding of pneumoconiosis can be made based upon x-ray evidence, biopsy or autopsy evidence, presumption, or the reasoned medical opinion of a physician based on objective medical evidence. In addition, the Fourth Circuit Court of Appeals has held that all types of relevant evidence must be weighed together in determining whether a claimant has pneumoconiosis. *Island Creek Coal Company v. Compton*, 211 F.3d 203 (4th Cir. 2000). As this case arises in the Fourth Circuit, I must therefore weigh the evidence in accordance with *Compton.*

Under the amended regulations, "pneumoconiosis" is defined to include both clinical and legal pneumoconiosis:

(a) For the purpose of the Act, "pneumoconiosis" means a chronic dust

disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical", pneumoconiosis and statutory, or "legal", pneumoconiosis.

> (1) *Clinical Pneumoconiosis*. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracolsilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
>
> (2) *Legal Pneumoconiosis*. "Legal Pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

(b) For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

(c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which first may become detectable only after the cessation of coal mine dust exposure.

20 C.F.R. § 718.201 (as amended December 20, 2000).

X-Ray Evidence. The x-ray evidence is conflicting. In determining the existence of pneumoconiosis based on chest x-ray evidence, "where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays." 20 C.F.R. §718.202(a) (1). The Board has held that it is proper to accord greater weight to the interpretation of a B-reader or Board-certified Radiologist over that of a physician without these specialized qualifications. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985); *Allen v. Riley Hall Coal Co.*, 6 B.L.R. 1-376 (1983). Moreover, an interpretation by a dually-qualified B-reader and Board-certified radiologist may be accorded greater weight than that of a B-reader. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 B.L.R. 1-128 (1984).

The x-ray evidence submitted in connection with this subsequent claim, which includes four new x-rays, is summarized in the table above; only the last two x-rays have been submitted in connection with the second modification request. The first x-ray, of October 22, 2002, was

interpreted by a single reader, a B-reader, as negative, and that x-ray may be deemed to be negative. The second x-ray, of March 17, 2003, was interpreted by a single B-reader as positive for pneumoconiosis, and that x-ray may therefore be deemed to be positive. The fourth x-ray, of January 13, 2005 was interpreted by one dually qualified reader as positive for pneumoconiosis but the same x-ray was interpreted by another equally qualified reader as negative for pneumoconiosis; that x-ray neither supports nor disproves a finding of pneumoconiosis. The final x-ray was interpreted by a single B-reader as negative for pneumoconiosis. Thus, two out of four x-rays were negative, one of four was positive, and one of the four – the only one interpreted by dually qualified readers -- was disputed. Inasmuch as the two most qualified readers disagree, I find that the x-ray evidence neither supports nor disproves a finding of clinical pneumoconiosis, when considering all of the new x-ray evidence or the x-ray evidence on this modification. However, as discussed below, it is the Claimant's burden of proof. Therefore, I find that the chest x-ray evidence does not establish the existence of pneumoconiosis and that Claimant has not established the presence of pneumoconiosis pursuant to the chest x-ray evidence set forth at 20 C.F.R. § 718.202(a)(1).

Autopsy or Biopsy Evidence. As there is no autopsy or biopsy evidence of record, Claimant has failed to establish the presence of the disease under 20 C.F.R. §718.202(a)(2).

Complicated Pneumoconiosis and Other Presumptions. A finding of opacities of a size that would qualify as "complicated pneumoconiosis" under 20 C.F.R. §718.304 results in an irrebuttable presumption of total disability. As there is no evidence of complicated pneumoconiosis, the section 718.304 presumption is inapplicable. The additional presumptions described in section 718.202(a)(3), which are set forth in 20 C.F.R. §718.305 and 20 C.F.R. §718.306 are also inapplicable, *inter alia*, because they do not apply to claims filed after January 1, 1982 or June 30, 1982, respectively. Further, section 718.306 does not apply, because the claim is not for death benefits. Thus, Claimant has failed to establish the presence of pneumoconiosis under 20 C.F.R. §718.202(a)(3).

Medical Opinions on Pneumoconiosis. As summarized above, medical opinions were rendered in connection with this subsequent claim by Drs. Rao, Forehand, Rasmussen, and Brooks.

In evaluating these opinions, I will take into consideration both the qualifications of the physicians and the content of their opinions from a quality standpoint. The qualifications of the physicians are relevant in assessing the respective probative values to which their opinions are entitled. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 B.L.R. 2-323 (4th Cir. 1998); *Burns v. Director, OWCP*, 7 B.L.R. 1-597 (1984). In assessing the probative values of the opinions themselves, I note that a doctor's opinion that is both reasoned and documented, and is supported by objective medical tests and consistent with all the documentation in the record, is entitled to greater probative weight. *See Fields v. Island Creek Coal Co.,* 10 B.L.R. 1-19 (1987). A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis, and a "reasoned" opinion is one in which the underlying documentation is adequate to support the physician's conclusions. *Fields, supra.*

Looking at the qualifications of the physicians, I find that Drs. Forehand, Rasmussen, and Brooks are highly qualified to express opinions. While I have insufficient information concerning Dr. Rao's credentials to make such an assessment, his inclusion on the list of physicians qualified to perform pulmonary examinations for the Department of Labor makes him presumptively qualified. Drs. Forehand and Rasmussen have worked extensively in the area of pulmonary diseases in miners, while Dr. Brooks is a highly qualified board-certified pulmonologist. Although Drs. Forehand and Rasmussen lack that credential, I find that their experience is such that the probative values of their opinions is not undermined thereby. I will therefore proceed to consideration of the opinions themselves.

As noted above, I have found the x-ray evidence to be equivocal and have therefore found that the Claimant has not met his burden of proof based upon that evidence to establish clinical pneumoconiosis, a factor which is of some significance in my consideration of the medical opinion evidence. In this regard, the existence of clinical pneumoconiosis is based to a large extent upon x-ray findings, particularly where, as here, there is no CT scan evidence. Relying in part upon the x-ray evidence, Drs. Rao and Brooks found no pneumoconiosis while Drs. Forehand and Rasmussen found both clinical and legal pneumoconiosis. The findings of clinical pneumoconiosis in the medical opinions of Drs. Forehand and Rasmussen, who are both B readers, were based in part upon the x-ray evidence. Dr. Forehand has listed a number of factors, including his own x-ray findings of CWP but not emphysema, that led him to determine that the Claimant suffered from CWP which in turn caused his COPD. Dr. Rasmussen has also reached similar conclusions. Their opinions are discussed in more detail below.

Even if a claimant cannot establish "clinical pneumoconiosis," he may nevertheless establish by the medical opinion evidence that he suffers from "legal pneumoconiosis" (i.e., chronic obstructive pulmonary disease [COPD] resulting from coal mine dust exposure.) In amending the regulations, the Department of Labor discussed the strong epidemiological evidence supporting an association between coal dust exposure and obstructive pulmonary disability (65 Fed. Reg. 79937-79945 (Dec. 20, 2000)), but it nevertheless chose to require that each individual claimant establish by a preponderance of the evidence that such an association occurred in that individual's case. *Id.* at 79938. Although this is a difficult burden to meet in cases, such as the instant case, where the x-ray evidence is equivocal, I nevertheless find that Claimant has met his burden here.

Dr. Rao found the Claimant to suffer from severe COPD and chronic bronchitis, which he attributed to cigarette smoking, as well as coronary artery disease, which he attributed to atherosclerosis. Although Dr. Rao conducted a complete examination and lists extensive findings and history, his conclusions are unsupported by any analysis.

In addition to finding CWP or clinical pneumoconiosis, Dr. Forehand found the Claimant to suffer from legal pneumoconiosis in the form of COPD. In support of that finding, he discussed specifics relating to Claimant's case, in particular his high exposure to coal and hard rock dust before the levels were legally brought under control, in the context of the epidemiological evidence relating to the effects of coal mine dust in smokers. While Dr. Forehand's analysis suggests that CWP is the mechanism by which the COPD is caused, he cites to a detailed list of factors (including physical complaints and examination findings) that led him

to diagnose CWP, in addition to the x-ray evidence. He also provided extensive references to studies showing that the magnitude of the effects of CWP was comparable to the effects of cigarette smoking in miners who worked in the mines during the period of time that the Claimant was so employed, and he extrapolated those findings to Claimant's individual case. His medical opinion is both documented and reasoned, and I found his discussion to be persuasive.

Dr. Rasmussen also found the Claimant to suffer from both legal and clinical pneumoconiosis. He also noted the Claimant's work history (including exposure to coal and silicon dioxide at the face of the mine), clinical findings (including laryngeal wheezing and bilateral basilar rales), symptomatology (including shortness of breath and cough), and test results (including severe, partially reversible obstructive ventilatory impairment, markedly reduced single breath carbon monoxide diffusing capacity, and moderate resting hypoxia). He concluded that the two known causes for Claimant's impaired function were cigarette smoking and coal mine dust exposure, both of which "cause COPD/emphysema and small airways disease, which are indistinguishable by physical, radiographic or physiologic means." He cited to articles in support of that conclusion, as well as the conclusion that coal mine dust exposure causes interstitial fibrosis. He concluded that the Claimant most likely had a combination of emphysema, interstitial fibrosis, and small airways disease, and that he suffered from both clinical and legal pneumoconiosis, both of which contribute in a major way to his disabling lung disease. I also found Dr. Rasmussen's opinion to be documented and reasoned, and his analysis to be persuasive.

Dr. Brooks also prepared a documented, reasoned report that discussed in detail the Claimant's history, physical examination, and test findings, and he set forth a reasoned discussion for his conclusion that the Claimant did not suffer from CWP but, rather, suffered from COPD. His analysis is premised upon his assumption that a finding of COPD along with negative x-ray findings negates a finding of CWP. He has also gone on to state that Claimant's COPD is "due to his long history of cigarette smoking" although it is also "possible that he has a contribution of an asthmatic component." However, while he has stated that the Claimant's coal mine employment was not a contributing factor to his current disability, he has not addressed the basis for that conclusion, apart from his conclusion that the Claimant suffers from COPD and not CWP. Thus, Dr. Brooks' opinion falls short of adequately addressing the issue of legal pneumoconiosis.

In view of the above, I find that the better documented and reasoned medical opinions of Drs. Forehand and Rasmussen establish that the Claimant suffers from legal pneumoconiosis. Consequently, I find that Claimant has established that he suffers from pneumoconiosis by the new medical opinion evidence pursuant to 20 C.F.R. § 718.202(a)(4).

All Evidence on Pneumoconiosis. Pursuant to *Compton, supra*, in considering all of the evidence submitted in connection with the current claim, both favorable and unfavorable, I find that the new evidence establishes the presence of legal pneumoconiosis, in the form of COPD that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment. I make that finding based upon the evidence on modification, as well as based upon all of the new evidence in support of this claim. While the Claimant may also suffer from

clinical pneumoconiosis, Claimant has not established it by a preponderance of the evidence in view of the equivocal x-ray evidence.

In view of my finding that the Claimant has established an element upon which the previous claim was denied, this case must be considered on the merits.

Merits of the Claim

The Supreme Court has made it clear that the burden of proof in a black lung claim lies with the claimant, and if the evidence is evenly balanced, the claimant must lose. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994). In *Director, OWCP v. Greenwich Collieries*, the Court invalidated the "true doubt" rule, which gave the benefit of the doubt to claimants. *See Id.* Thus, in order to prevail in a black lung case, a claimant must establish each element by a preponderance of the evidence.

Existence of Pneumoconiosis based upon All Evidence

As stated above, I have found legal pneumoconiosis to be established based upon the new evidence. I must now proceed to consider whether I reach the same conclusion based upon all of the evidence of record, including evidence from the prior claims.

Because pneumoconiosis is a progressive and irreversible disease, it may be appropriate to accord greater weight to the most recent evidence of record, especially where a significant amount of time separates newer evidence from that evidence which is older. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989) (en banc); *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). In the case of x-ray evidence, more recent positive evidence may be credited over older negative evidence, but the Benefits Review Board has stated that "it is irrational to credit the most recent evidence strictly on the basis of its chronology, if that evidence is negative for pneumoconiosis." *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (BRB 2003).

As noted above, Judge Rosenzweig found the medical evidence did not support a finding of pneumoconiosis. In this regard, as she noted in her decision, the preponderance of the chest x-ray evidence from the previous claim was negative for pneumoconiosis; there was no biopsy or autopsy evidence; and the presumptions were inapplicable. Judge Rosenzweig also found the medical opinions of Drs. Castle and Stewart to the effect that the Claimant did not have pneumoconiosis to outweigh the opinions to the contrary of Drs. Prakash, Rao, and Wynne because they were "most consistent with the Claimant's long history of tobacco abuse and the credible objective clinical data, including the overwhelming preponderance of the negative x-ray evidence, the reversibility on administration of bronchodilators as pointed out by these physicians and shown on pulmonary function testing, and the normal arterial blood gases." (DX 1). The Board affirmed Judge Rosenzweig's finding.

In reviewing the evidence previously of record, I cannot say that I would have reached a different result had I been in Judge Rosenzweig's place. Thus, I agree that the better reasoned medical opinions tended to negate a finding of pneumoconiosis of either kind, and the x-ray

evidence before Judge Rosenzweig was clearly negative. However, in view of the recognized progressive nature of the disease, I do not find these earlier opinions to control.

Therefore, when all of the pneumoconiosis evidence from both the current and previous claims is weighed together, I find that Claimant has established the existence of pneumoconiosis.

Causal Relationship with Coal Mine Employment

As Claimant has established that he suffers from pneumoconiosis and that he has worked in coal mining for over ten years, he is entitled to a rebuttable presumption that the disease arose from coal mine employment. 20 C.F.R. § 718.203(b) (2001). I find that the presumption has not been rebutted.

Total Disability

The regulations as amended provide that a claimant can establish total disability by showing pneumoconiosis prevented the miner "[f]rom performing his or her usual coal mine work," and "[f]rom engaging in gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time." 20 C.F.R. §718.204(b)(1). Where, as here, there is no evidence of complicated pneumoconiosis, total disability may be established by pulmonary function tests, arterial blood gas tests, evidence of cor pulmonale with right sided congestive heart failure, or physicians' reasoned medical opinions, based on medically acceptable clinical and laboratory diagnostic techniques, to the effect that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in the miner's previous coal mine employment or comparable work. 20 C.F.R. §718.204(b)(2). For a living miner's claim, it may not be established solely by the miner's testimony or statements. 20 C.F.R. §718.204(d)(5). Claimant's job description must be considered in light of the medical evidence.

Pulmonary Function Tests. As summarized in the table above *supra*, all of the four pulmonary function tests taken in connection with the instant claim, between October 2002 and August 2005, are qualifying. The tests taken between 1994 through 1996 that were in evidence before Judge Rosenzweig were invalidated by one or more physicians, except for two tests, one of which (September 18, 1990) was not qualifying (although the values were reduced) and the other of which (October 14, 1994) was not qualifying after bronchodilator. The previous tests are therefore nonqualifying. However, I find the more recent tests to have more probative value in view of the progressive nature of the disease. Accordingly, I find that the Claimant has established total disability under section 718.204(b)(2)(i) based upon the pulmonary function tests.

Arterial Blood Gas Studies. As summarized above, only one of the four recent ABGs is qualifying at rest although the three exercise values are qualifying. In view of the exertional level required by Claimant's job, I find the exercise values to be more probative. None of the ABG studies from Claimant's previous claims provided qualifying values, however. Again, in view of the progressive nature of the disease, I find the more recent tests to have more probative

value. Accordingly, I find that the Claimant has established total disability under section 718.204(b)(2)(ii) based upon the arterial blood gas evidence.

Cor pulmonale with right-sided congestive heart failure. There is no evidence of cor pulmonale[18] or congestive heart failure, so Claimant has not established total disability under section 718.204(b)(2)(iii).

Medical opinions. As summarized above, medical opinions were rendered by Drs. Rao, Forehand, Rasmussen, and Brooks in the instant claim. Each of these physicians determined that the Claimant was totally disabled on a pulmonary or respiratory basis. Drs. Forehand and Brooks specifically stated that Claimant would be unable to return to his last coal mine job. At the time of the previous claim, Dr. Prakash found the Claimant to be disabled from any type of job and Dr. Stewart opined that he would be prevented from doing heavy physical labor such as would be required for an inside job but Dr. Castle opined that with proper treatment and cessation of smoking he might be able to return to coal mine employment. The remaining doctors did not squarely address the issue. I find that the more recent evidence has more probative value in establishing the Claimant's current disability, particularly in view of the progressive nature of the disease, and I further find that the medical opinion evidence under section 718.204(b)(2)(iv) establishes total disability.

Section 718.204(b)(2) as a whole. Taking into account all of the evidence of record, I find that Claimant is incapable of performing his last or usual coal mine employment on a pulmonary or respiratory basis. Based upon my review of the Claimant's testimony, the job history he gave to physicians, and other matters of record, I conclude that the Claimant's employment working on the beltline involved heavy manual labor, including lifting in excess of 50 pounds. Further, I find that the medical evidence, and specifically the medical opinions interpreting that evidence, establishes that he is totally disabled by a pulmonary or respiratory condition.

Causation of Total Disability

After establishing that a miner is totally disabled, a claimant must still establish that the miner's total disability was caused at least in part by his or her coal mine employment. 20 C.F.R. §718.204(a). If the presumptions are not available to a claimant, that claimant must prove the etiology of the disability by a preponderance of the evidence, even if he or she has proven the existence of total disability. *See Tucker v. Director,* 10 B.L.R. 1-35, 1-41 (1987).

Under the amended regulations, a claimant must show that "pneumoconiosis . . . is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment," which means that it had a material adverse effect on the miner's respiratory or pulmonary condition or that it materially worsened a totally disabling respiratory or pulmonary impairment caused by a disease or exposure unrelated to coal mine employment. 20 C.F.R. § 718.204(c)(1). In making this determination, the finder-of-fact must not take into account any

[18] One of the x-ray readings listed "cp", which references cor pulmonale, but the accompanying report does not mention cor pulmonale. Instead, it references central pulmonary artery enlargement. (EX 4). Without more to support the suggestion of cor pulmonale, I must conclude that the initials were mistakenly used.

non-pulmonary or non-respiratory impairments a miner may have, unless said condition causes a chronic respiratory or pulmonary impairment. 20 C.F.R. §718.204(a).

Thus, the new regulations place an additional burden upon the Claimant to establish a substantial contribution by pneumoconiosis. In this regard, the Department of Labor commented in the preamble to the regulations that "evidence that pneumoconiosis makes only a negligible, inconsequential, or insignificant contribution to the miner's total disability is insufficient to establish that pneumoconiosis is a substantially contributing cause of that disability." 65 Fed. Reg. 79946 (Dec. 20, 2000). However, the new regulations also allow for a finding of total disability due to pneumoconiosis even when there is another totally disabling respiratory or pulmonary condition if pneumoconiosis has a material adverse effect or materially worsens an unrelated total respiratory or pulmonary disability. *See* 20 C.F.R. § 718.204 (2001).[19]

The Benefits Review Board had an opportunity to examine this new provision in *Gross v. Dominion Coal Corp.*, 23 B.L.R. 1-10 (2003).[20] In that decision (slip op. at 6 to 7), the Board held that an opinion (by Dr. Forehand) stating that pneumoconiosis was one of two causes of the miner's totally disabling pulmonary condition, but which did not attempt to specify the relative contributions of coal dust exposure and cigarette smoking, was sufficient to satisfy the new standard. The Board found that the doctor's opinion satisfied that "material adverse effect" requirement. The Board also found that substantial evidence supported the administrative law judge's discrediting of the opinion offered by the employer's expert (Dr. Castle) under *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 B.L.R. 2-269 (4th Cir. 1997), which held that an administrative law judge should consider the explanation provided by an expert offering an opinion.

However, in its unpublished decision in *Phillips v. Westmoreland Coal Company,* BRB No. 04-0379 BLA (Benefits Review Board Jan. 17, 2005), the Board indicated that under *Gross*, an opinion which stated that pneumoconiosis was one of two causes of a miner's totally disabling pulmonary condition was sufficient (even if it did not attempt to apportion the relative contributions), but that a report that did not address all of the etiological factors for the miner's total respiratory disability was inadequate (even though it stated unequivocally that the Claimant's disability was caused by pneumoconiosis). *Phillips* slip op. at 3 to 4. The Board went on to note that "[a] physician must state the basis for his opinion and explain how the objective data supports his diagnosis in order for his opinion to be considered both documented and reasoned." *Id.*

I have examined the opinions of each of the physicians addressing this issue:

- Dr. Rao found COPD and chronic bronchitis but attributed each to smoking. Although he found the Claimant to be totally disabled by the diagnosed conditions, which also

[19] As noted above, in *National Mining Assn. v. Dept. of Labor*, 292 F.3d. 849 (D.C. Cir. 2002), the U.S. Court of Appeals for the D.C. Circuit found the portion of 20 C.F.R. § 718.204(a) providing that unrelated nonpulmonary or nonrespiratory conditions causing disability will not be considered in determining whether a miner is totally disabled due to pneumoconiosis to be impermissibly retroactive. The section was otherwise upheld.

[20] The decision is available on the BRB website, which may be accessed via a link from the OALJ website, www.oalj.dol.gov.

included coronary artery disease, he did not indicate the respective contributions by the respiratory conditions and the coronary artery disease nor does he address how those conditions affect the Claimant's ability to perform his last coal mine job. His opinion does not assist me in resolving the issue.

- Dr. Forehand attributed the Claimant's respiratory impairment to the combined effects of CWP and cigarette smoking, he opined that the Claimant lacked the respiratory capacity to meet the physical demands of his last coal mine work, and he stated that the Claimant's disability has arisen from a combination of CWP and smoking cigarettes. His opinion would appear to qualify under *Gross* as the known etiological factors for Claimant's respiratory impairment are smoking and coal mine dust exposure, which he addresses.
- Dr. Rasmussen also attributed the Claimant's impairment to both smoking and coal dust exposure and stated that they were the only known causes for Claimant's impaired function. His opinion would also appear to qualify under *Gross.*
- Dr. Brooks attributed the Claimant's respiratory impairment to "past cigarette smoking causing chronic obstructive pulmonary disease," and he opined that the Claimant was disabled by COPD, which he characterized as a combination of emphysema and chronic bronchitis, with an asthmatic or bronchospastic component. He went on to say that coal mine employment was not a contributing factor to the Claimant's current disability. His opinion therefore runs counter to those of Dr. Forehand and Dr. Rasmussen.

Thus, in resolving this issue, I must determine whether the opinions of Drs. Forehand and Rasmussen or that of Dr. Brooks is entitled to controlling weight. For the reasons set forth above in my discussion of legal pneumoconiosis, I find that Dr. Brooks opinion is essentially conclusory on the issue of what caused the COPD while, in contrast, Drs. Forehand and Rasmussen discussed the epidemiology in some detail. Accordingly, I find that the Claimant has established disability causation through the opinions of Drs. Forehand and Rasmussen.

CONCLUSION

Having established all of the requisite elements of entitlement under the Act and regulations by a preponderance of the evidence, Claimant is entitled to receive benefits.

Onset Date

Under section 725.503(d)(2), where modification is granted based upon a change in conditions, the date for commencement of benefits is "the month of onset of total disability due to pneumoconiosis arising out of coal mine employment," provided that benefits may not be payable for any month prior to the effective date of the most recent denial of the claim by the district director or the administrative law judge, but "[w]here the evidence does not establish the month of onset, benefits shall be payable to such miner from the month in which the claimant requested modification." None of the medical evidence or testimony offered in connection with this claim conclusively establishes the precise date that Claimant first became totally disabled due to pneumoconiosis. Here, the district director denied the first modification request on December 4, 2003 and Claimant filed this modification request on February 11, 2004.

Accordingly, benefits shall commence as of February 2004, the month Claimant first filed the second modification request.

Attorney's Fee

No award of an attorney's or representative's fee is made herein because no fee application has been received. *See* 30 U.S.C. § 932; 33 U.S.C. § 928. The Claimant's attorney shall have thirty days for submission of a fee application in conformance with 20 C.F.R. Part 725 and the other parties shall have thirty days to file any objections, provided that these dates may be extended upon the stipulation of the parties or for good cause shown.

ORDER

IT IS HEREBY ORDERED that the claim of C.B. for black lung benefits be, and hereby is, **GRANTED** and B. Coal Company and its insurer American Business & Mercantile Reassurance Company shall commence payment of benefits and shall reimburse the Trust Fund for interim benefits paid.

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PAMELA LAKES WOOD
Administrative Law Judge

Washington, DC

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed. At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen H. Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).